No. 97-8214
A-732

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1997

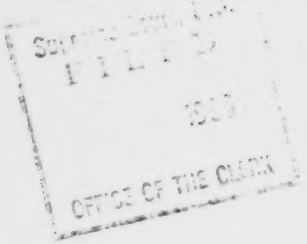
ANGEL FRANCISCO BREARD,

Petitioner

v.

FRED W. GREENE, WARDEN,

Respondent



WARDEN'S SUPPLEMENTAL OPPOSITION

On April 9, 1998, the International Court of Justice (ICJ) at the Hague "indicated" what are called "provisional measures," stating that the United States "should take all measures at its disposal to ensure" that the execution of Virginia death row prisoner Angel Breard, now scheduled for April 14, 1998, is not carried out pending final judgment by the ICJ in Paraguay v. United States. Breard now has brought the ICJ's "indication" to the attention of this Court and argued that he is thereby entitled to a stay of his execution.

Breard obviously is ***not*** contending that the ICJ's "provisional measures" in and of themselves constitute a stay of his execution. After all, if the ICJ supposedly had the authority to stay Breard's execution and in fact had done so, there would no execution date left for Breard to ask this Court to stay. Not even Breard, however, is rash enough to invest the ICJ with such

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omnipotence, as is evident from the fact that, despite the ICJ's action, he has asked this Court for a stay.

Breard merely is asserting that the ICJ's "provisional measures" provide an additional basis upon which this Court should grant his stay motion. The question, therefore, that this Court must ask is: "For what event or occurrence is the Court being asked to stay Breard's execution?" If the Court is being asked to stay a State prisoner's execution during the indeterminate number of years that Paraguay's action against the United States is likely to remain pending before the ICJ,[1] in the hope that Paraguay will prevail and that the ICJ's judgment somehow will affect Breard's state court conviction or sentence, then the Court clearly must deny the request because neither this Court, nor any other federal court, has the authority to stay a State prisoner's execution while he or someone else litigates a case in a foreign court. Once direct appeal has been completed, a federal court's sole authority to stay a State prisoner's execution is pursuant to 28 U.S.C. § 2251, in the context of ongoing federal habeas corpus proceedings.[2] See also Gomez v. United States District

[1] Virginia has been informed by the State Department that the typical ICJ action remains pending for more than five years prior to final decision. The fact that the ICJ has initiated what it regards as a "expedited" briefing schedule should be of no solace to the Court, and certainly is of no solace to Virginia. Requiring Paraguay to file its brief in June and the United States to file its brief in September hardly coincides with Virginia's view of "expedited." In any event, the ICJ has imposed no deadline on itself for decision and therefore a stay pending final judgment by the ICJ would be not only unauthorized, but intolerable. It simply makes no sense, moreover, to stay a State prisoner's execution pending the outcome of an international proceeding which, in the end, can have no binding effect on the validity of his conviction or sentence.

[2] On direct appeal, this Court may stay a state court criminal judgment pending disposition of a certiorari petition. See 28 U.S.C. § 2101(f).

Court, 503 U.S. 653 (1992) (any request to stay a State prisoner's execution after he has litigated one federal habeas petition must satisfy the stringent rules governing successive petitions).

Even if this Court had the raw authority to grant a stay for such a highly questionable reason, the Court clearly should not take the extraordinary and unprecedented step of granting a stay of a State prisoner's execution for as long as an international tribunal – over which this Court has no supervisory authority – may choose to take in reaching a decision that ultimately can have no binding effect on the prisoner's conviction or sentence. ***Indeed, it would be difficult to overestimate the harm that such a decision would cause to the interests of federalism, comity and finality that this Court has sought to foster in cases dealing with State prisoners***. This is particularly true where, as here, the prisoner is asking for relief on the basis of ***a defaulted claim that he admits he never raised in state court.***

Finally, if Breard is asking the Court (as he did originally) to stay his execution merely because of the pendency of his certiorari petition, the ICJ's action simply is irrelevant. Nothing the ICJ has done, or may do, can affect the issue of whether Breard is entitled to a stay of execution from a federal court on the basis of a defaulted claim. (See Warden's previously-filed opposition to Breard's certiorari petition and stay motion). Breard's stay motion must rise or fall on its own merits, irrespective of the ICJ's "provisional measures." ***Indeed, Breard clearly has no standing to ask a federal court to enforce a judgment by the ICJ***. See Committee of United States Citizens v.

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Reagan, 859 F.2d 929, 934 (D.C. Cir. 1988) ("Neither individuals nor organizations have a cause of action in an American court to enforce ICJ judgments").[3]

CONCLUSION

For all the foregoing reasons and those set forth in the respondent's previously-filed opposition to Breard's stay motion, this Court should deny Breard's request to stay his execution.

Respectfully submitted,

FRED W. GREENE, WARDEN

By: _____
Counsel

[3] The Court should be aware that the United States vigorously has opposed Paraguay's action in the ICJ, as well as Paraguay's request for "provisional measures." The United States argued forcefully that the ICJ had no jurisdiction to issue the "provisional measures" or to grant Paraguay's request to void Breard's capital murder conviction and death sentence. (See Attachment 2 to Warden's opposition to Breard's original jurisdiction habeas petition and stay request). The United States also has informed Paraguay that the alleged treaty violation in Breard's case had no substantial effect on his conviction or sentence. (See Attachment 3 to Warden's opposition to Breard's original jurisdiction habeas petition and stay request). Under these circumstances, the ICJ's "provisional measures" clearly constitute a non-justiciable "political question" and, while they may be dealt with by the Executive Branch of the United States Government, they certainly cannot serve as a basis for a federal court's stay of a State prisoner's execution. See generally Head Money Cases, 112 U.S. 580, 598 (1884) (a treaty "depends for the enforcement of its provisions on the interest and honor of the governments which are parties to it. If these fail, its infraction becomes the subject of international negotiations and reclamations...[but] with all this the judicial courts have nothing to do and can give no redress"); Foster v. Neilson, 27 U.S. 253, 314 (1829) ("when either of the parties [to a treaty] engages to perform a particular act, the treaty addresses itself to the political, not the judicial department").

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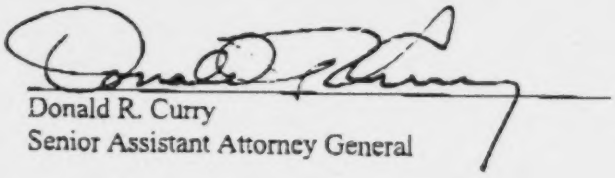
Donald R. Curry
Senior Assistant Attorney General
Office of the Attorney General
900 East Main Street
Richmond, Virginia 23219

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of April, 1998, a copy of the foregoing Supplemental Opposition was faxed to Alexander H. Slaughter, McGuire, Woods, Battle & Boothe, One James Center, 901 East Cary Street, Richmond, Virginia 23219-4030, counsel for petitioner.



Donald R. Curry
Senior Assistant Attorney General

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